Organizational Conflicts of Interest

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Agenda

- What is an OCI?
- Guiding Principles
- FAR Provisions
- Why the interest?
- Role Of Contracting Officer
- SMC OCI Policy
- Conclusion

What is an OCI?

- Conflicting roles that might bias a contractor's judgment exist when
  - Providing evaluation services
  - Providing advisory and assistance services
- An unfair competitive advantage exists where
  - Preparing specifications or work statements
  - Having access to proprietary data of other contractors
  - Having access to source selection information not available to all competitors

Guiding Principles

- Overriding principle – ensure public confidence in the integrity of the procurement system
- Government has inherent right to protect itself from conflicts of interest [*NKF v. U.S.*, 805 F.2d 372 (1986)]
- Practical reasons to avoid OCIs
  - OCI can derail a source selection
  - Civil or criminal liability
  - Reliance on support contractors

FAR Provisions

- Principles result in three broad categories of OCI (FAR 9.505 lists four, but they overlap)
  - Evaluation of own work impairs objectivity (FAR 9.505.1 & .3)
  - Contractor sets “ground rules” of procurement (writing SOW or performing systems engineering and technical direction effort) skewing competition in its own favor (FAR 9.505.1 & .2)
  - Access to nonpublic information in performance of Government contract (FAR 9.505-4)

FAR Provisions

- FAR 9.505-1 -- Providing Systems Engineering and Technical Direction
  - Contractor provides systems engineering and technical direction for a system but does not have overall contractual responsibility for development and integration
  - Prohibits contractor from
    - Being awarded a contract to supply the system or any of its major components; or
    - Being a subcontractor or consultant to a supplier of the system or any of its major components.

FAR Provisions

- FAR 9.505-2 -- Preparing Specifications or Work Statements
  - Where contractor provided specifications for non-developmental items – may not compete to supply item
  - But normal to select firms most advanced in field for developmental work
    - These firms can be expected to design and develop around their own prior knowledge
    - Creates unavoidable competitive advantage that is not considered unfair; hence no prohibition

FAR Provisions

- FAR 9.505-3 -- Providing Evaluation Services
  - Prohibits a contractor from evaluating its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests
- FAR 9.505-4 -- Obtaining Access to Proprietary Information
  - Contractors who obtain access to proprietary data must protect data from unauthorized use
  - Usually requires company-to-company agreements to protect and properly use such data

Why the interest?

- Increasing reliance on Advisory & Assistance Services (A&AS) contractors
- Defense Industry Consolidation
  - Consolidation at prime level
  - Acquiring traditional A&AS contractors
- A&AS support at other USAF/DoD organizations that may impact program
- Direction from UnderSecretary
  - SMC and NRO solicited comments from industry
  - All said follow FAR, but no agreement on end result

Role of Contracting Officer

- Government has primary responsibility!
  - Fall to contracting officers
- Mitigation plan must be reasonable
  - Firewalls protect information, can't eliminate bias
  - Some OCIs cannot be mitigated
    - *Aetna*, B-254397, 95-2 CPD ¶ 129 (1995)
- Need reasonable basis to determine OCI exists, not that harm occurred
  - *NKF v. U.S.*, 805 F.2d 372 (1986)
  - *CACI v. U.S.*, 719 F.2d 1567 (1983)
  - Both cases supported CO's reasoned decision

SMC OCI Policy

- **Pre-award**
  - **OCI must be addressed at ASP**
  - **SMC/PK must concur that no OCI exists, or approve OCI mitigation plan**
  - **If OCI cannot be mitigated either exclude offeror from competition or obtain waiver where contractor support essential**
- **Post-Award**
  - **Government – initial and periodic training**
  - **Contractor – initial and periodic training/audit plan implementation**

SMC OCI Policy

- Mitigation plans must address:
  - Roles and responsibilities
  - Separation: physical, organizational, electronic
  - Non-disclosure agreements
  - OCI training and briefing statements
  - Restrictions on personnel assignments/transfers
  - Data/documentation separation and control
  - Softcopy documentation control
  - Contractor self-audit policy
  - Government audit provisions
  - Records control
  - Subcontractor flow-down policy

Conclusion

- Government has the responsibility to ensure OCIs are properly handled
- Our ultimate customer is the general public – needs to have absolute confidence in the impartiality of the Government process